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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 527

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, Et Al.,
Appellants,

vs.

ARROW TRANSPORTATION COMPANY, Et Al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Northwestern Divison.

BRIEF OF RAILROADS, APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM.

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Statement.

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, the Railroads, appellants, file this Brief in opposition to the Motion to Affirm, filed by the appellees.

Argument.

The filing of the Motion to Affirm has served the purpose of highlighting the fact that neither the Jurisdictional Statements nor the Motion to Affirm, and the replies as now being filed, are sufficient to fully inform the Court as to the important matters raised by this appeal, full briefing and argument being required.

The major premise of the Motion to Affirm is that this appeal is but a repetition of *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; and *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66, aff'd 342 U.S. 951.

At the very outset it is necessary to state the framework within which this appeal lies. In its first order of July 18, 1955, the Commission dismissed the complaint notwithstanding arguments based on the *Mechling* and *McWilliams Blue Line* cases, among others. In its second order of March 19, 1958, which was for the specific purpose of reviewing the record in light of the new decision of this Court in the *Dixie Carriers* case, the Commission again found that the complaint should be dismissed and that the *Dixie Carriers* case did not require any change in its position. But the Commission has now reversed itself and has said that this reversal is compelled by the *Mechling* and *Dixie Carriers* cases. Although it is abundantly clear from the face of the Commission's order that it felt its action was contrary to the public interest, it not only made available the rail proportional on ex-barge grain, thus giving the shippers everything in the way of proportional rates ex-barge that they might obtain ex-rail, but it went even further and made a 3(1) finding to the effect that on the Tennessee River, where there were no rail proportional rates, new rates should be placed in effect, giving the ex-barge movement inland from these ports rates which were the exact equivalent of those that existed elsewhere, for ex-rail movement, namely, at Memphis, the primary point of competition.

Accordingly, as a result of the March 24, 1959, decision, the complaining barge lines and their adherents can no longer point to the *Dixie Carriers*, *Mechling*, or *McWilliams Blue Line* cases. The tables have been turned and it is the Railroads who are appealing from the Commission's order, the appeal being lodged in the District Court of

Kansas and not yet before this Court.

The Commission, having made available the proportional rates where they existed and having created their equivalent on the Tennessee River where they did not exist, closed its case.

The issue that was before the Alabama Court is the refusal of the Commission to consider divisions as evidence, which the appellees wish introduced in the hope that if they are used as a standard they might produce rates even lower than the proportionals constructed by the Commission. Of course transit balances were readily available and no one seriously considered them as forming yardsticks in the Commission's procedure.

In their Kansas appeal, the Railroads will show that the Commission was in error in reversing itself, but regardless of what may be the outcome in that proceeding, it should be evident from the following brief reply that the three cases relied upon in the Motion to Affirm in no way sustain either the Motion to Affirm or the Alabama decision, or at least it should indicate that more complete development is necessary than can be made in this brief reply.

For the purpose of this reply, it should be sufficient to show that these three cases are clearly distinguishable from the case at bar not only as to the circumstances which brought the litigation into being, but also on the facts upon which the three cases are based.

First, all three of those cases arose out of intercarrier sparring for advantage in which the Railroads took affirmative steps in the construction of their rates, or the denial of participation by the barge lines, which had the direct purpose of attracting traffic to the Railroads as against the barge lines.

In the *Mechling* case, the rate maneuvers of the Railroads were frankly admitted to be for the purpose of putting

traffic back on the railroads—an admission which found its way into the decision of this Court.

In the *Dixie Carriers* case, the effort of the barge lines to participate in the traffic was being resisted through the refusal to join in requested joint through rates. This was coupled with the construction of an all-rail rate definitely aimed at the barge-rail rate in order to attract traffic to an all-rail movement.

In the *McWilliams Blue Line* case, again the Railroads made an affirmative effort to attract traffic to the rail-ocean-rail route rather than the rail-ocean-barge route through the use of rates.

In contrast to these three cases, where the rail lines were aggressively endeavoring through the use of their rate structure to recapture or retain traffic, in the instant case there have been no efforts on the part of the rail lines to effect any kind of intermode advantage. The grain rate structure in question was devised through long and painful litigation before the Commission without any thought of intermode competition. It was designed and delicately adjusted through the years to meet the needs of the producers, the shippers, the processors, and consumers of grain and products. Such competition as it encompassed was rail versus rail.

It is the barge lines in the instant case who are the aggressors and who are endeavoring by rate manipulation to obtain a competitive advantage regardless of consequence to the public interest as a whole.

Second, these three cases are wholly distinguishable as to the facts upon which the decisions were premised. In all three of those cases there was no issue as to whether or not there were connecting carriers. Here there is. (But

it is an issue before the Kansas rather than the Alabama court.)

In all three of those cases there were through movements. Here there is not.

In the *Mechling* and *McWilliams Blue Line* cases there were "proportional" rates available for ex-rail movements which were either denied to the barge lines or made available with a differential. In the instant case it must be remembered that the final decision of the Commission, which is here under appeal, not only gave the complaining barge lines the benefit of proportional rates where they existed, but in a Secton 3(1) finding required that rates comparable to the ex-rail proportionals be made available on the Tennessee River—where these proportionals did not exist.

So in the present posture of this case the complaining barge lines have either already been given the benefit of rail proportionals or have had proportionals prescribed for them where they did not exist through the Commission's order of March 27, 1959.

It should not be assumed, however, that the Railroads are acquiescing in the foregoing requirement of the Commission's order. But this question is not now before the Court as it is the subject of the Railroads' appeal before the Kansas District Court.

While mentioning the fact that the foregoing matter is before the Kansas Court and is not the subject of the Alabama litigation, it should be pointed out that it is inevitable that there will be some confusion arising out of the splitting of issues and the fact that the two appeals have not progressed to the same stage. It will be recalled that this arose due to the fact that the Alabama litigants elected to press their appeal from that portion of the order which was not reversed at the time the Railroads were still before the

Commission on a Petition for Reconsideration as to the new portion of the order in which there was the reversal. As there was only one complaint, one record, and a disposition in one order before the Commission, not only will there be resulting confusion, but to some degree there may be prejudging of those matters which are only before the Kansas Court and not under consideration in the appeal from Alabama if this portion of the case is decided independently of the other.

Since two of the three original barge lines were not before the Alabama Court, nor were the eastern railroads, whereas both of these interests, as well as all of those before the Alabama Court, are parties to the Kansas litigation, it may be that this Court will desire to reserve further action in the instant appeal until the two cases can be brought together again and disposed of once more on a common record, common briefs, and a single decision. However, both appeals are necessary to place all of the March 24, 1959 order before this Court.

Reverting to the case at bar, as pointed out above, one of the very real differences between the *Mechling*, *Dixie Carriers*, and *McWilliams Blue Line* cases and that before the Court is the fact that the complainants have already been given the ex-rail proportionals where they exist and have had their equivalent prescribed for them under Section 3(1) where they do not exist (hence there will be ex-barge proportionals as a result of the Commission's latest order, which are broader in scope than those available under ex-rail). It is only because the complainant and its supporting interests wish to indulge in what is nothing more than a fishing expedition to discover whether there is not some method to construct a still lower rail rate that this case was pressed in an endeavor to have divisions put in evidence, or even to have transit balances considered as evidence.

It is not possible within the limits of brevity, which it is

assumed are imposed on this reply, to give adequate treatment to assertions and assumptions of the Motion to Affirm, which require something more than a mere counter-assertion on the part of these appellant Railroads. There is one assertion, however, to which a reply will be made as it is important to the case and forms a point of distinction from the *Dixie Carriers* case in particular. On pages 7 and 8 of the Motion there are numerous references which would make it appear that the Commission had before it the rates covering the entire movement, both barge and rail, and that it might make a determination of those rates under Section 307.

From the very inception of the case the barge lines were very insistent that the barge rate was not in issue and could not be considered by the Commission. In fact attempts by the Railroads to bring the barge factor before the Commission were successfully resisted. The Commission made findings to this effect and noted that it formed a distinction (303 I.C.C. 470-471):

> "There are distinctions between the facts and issues presented in the *Dixie Carriers* case and those in this proceeding. As noted, the complaining barge lines there sought joint barge-rail routes and rates under Section 307(d), which are not sought here. The barge lines there assumed the expense of the transfer of lading to rail cars and the tender of the cars to the rail line, where here the barge lines' responsibility ceases when the traffic reaches the ports, and they have no interest in establishing through routes and joint rates.
>
> * * * In addition, the establishment of a single through rate was sought in the *Dixie Carriers* case; while here it is asked that a blanket application of rates for segments of all-rail movements, performing a finely-balanced function in an extremely complex rate structure, be required also on ex-barge traffic."

Before closing this reply, comment should be made on some facts which, though not of legal significance, are

nevertheless indicative of the importance of this appeal and the appeal now pending in Kansas. For reasons which were apparently sufficient at the time, the Railroads did not intervene either before the three-judge court or before this Court to present an argument in the *Mechling* case, nor were the shipping interests parties. In the instant proceeding, not only the Railroads, but the shipping interests are quite actively participating. It is also a case in which a full record has been made in contrast to that available in the *Dixie Carriers* case, which was of so small a consequence to shippers that it was dismissed after the Supreme Court's decision as moot. The importance with which the parties are regarding the present case is certainly an indicia of its impact on the economy and the future of transportation barge and rail.

Conclusion.

Since the Motion to Affirm relies on the *Mechling*, *Dixie Carriers*, and *McWilliams Blue Line* cases, and since those cases are so readily distinguishable, it is respectfully requested that the Motion to Affirm be denied and for the reasons heretofore given in the Jurisdictional Statement, as well as for the reasons herein, that probable jurisdiction be noted to the end that adequate review of the decision and judgment of the District Court may be had, and that upon such review, such decision and judgment be set aside.

Respectfully submitted,

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December 31, 1959